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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, J. A. VIATOR, J. J. VIATOR, ET AL.,

Appellants,

vs.

R. C. EDWINS, SHERIFF OF HARRISON COUNTY, MISSISSIPPI, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. H. SUMRALL,
Counsel for Appellees.

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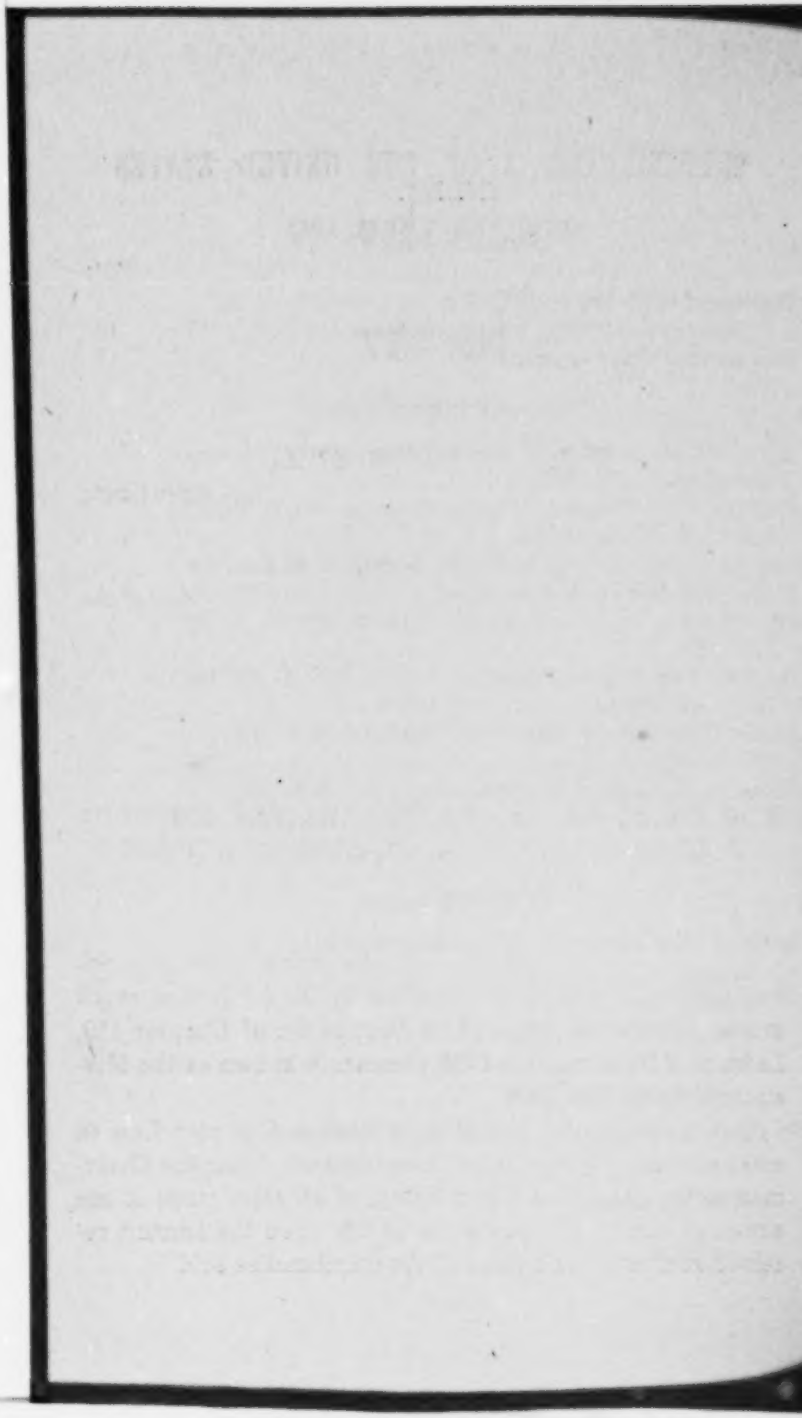

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, ET AL.,

vs. *Appellants,*

R. C. EDWINS, SHERIFF, ET AL.,

Appellees.

APPEALED FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF APPELLEES AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

This case involves the liability of a citizen of Mississippi engaged in the sale of merchandise by the conduct of retail stores, for the tax imposed by Section 2-c of Chapter 119, Laws of Mississippi for 1934, commonly known as the Mississippi Sales Tax Law.

This taxpayer was required by Section 5 of said Law to make monthly reports to the Commissioner, being the Chairman of the State Tax Commission, of all sales made in the previous month, and pay a tax of 2% upon the amount received as a retail sale price of the merchandise sold.

Section 8 of said Law requires the taxpayer to preserve for a period of two years all invoices indicating the amount of merchandise purchased for sale, which invoices and records are open to inspection by representatives of the Commissioner charged with the duty of administering the Sales Tax Law. And said Section provides that if adequate records are not kept, the Commissioner may make additional returns and assessments from the best information available, which returns and assessments shall be prima facie correct, and the amount of tax shown to be due shall be a lien against all the property of the taxpayer.

Section 10 of the Act as amended by Chapter 113, Laws of Mississippi for 1938, provides that where a taxpayer feels aggrieved by the additional assessment of taxes against him, he may file a petition in writing requesting a hearing before the whole Commission, to oppose the correctness of said assessment, and the Commission shall grant a hearing and make such order in the matter as may appear to it just and lawful.

The record in this case, as disclosed by former opinions, shows that notice of additional assessment was made against Eddie J. Viator, the principal appellant and taxpayer, in September, 1939. That a petition was filed and hearings granted thereon, and a final order entered by the Commission sustaining the correctness of the additional assessment made.

Section 10 of said Act, as amended, provides that where any taxpayer feels that he is improperly charged with a tax and required to pay same, that he may pay said tax and recover same together with interest and cost by filing suit in the Circuit Court in his county, and upon recovery of judgment, the Auditor of Public Accounts is required to issue a warrant for the amount of the judgment obtained, and the Treasurer of the State of Mississippi is required to pay said warrant.

The record discloses that instead of pursuing the statutory method provided, this taxpayer elected to remove the matter to the Circuit Court of Hinds County of Mississippi by Writ of Certiorari. And upon the hearing of said cause, a judgment was entered by the Circuit Court of Hinds County against the taxpayer, E. J. Viator, and J. A. Viator, and J. J. Viator, sureties on the Certiorari Bond.

An appeal was taken to the Supreme Court of Mississippi from the judgment rendered by the Circuit Court of Hinds County, Mississippi, and the Supreme Court of Mississippi affirmed the judgment of the Circuit Court of Hinds County by an In Banc opinion rendered on the 12th day of January, 1942. A suggestion of error was filed in the Supreme Court of Mississippi, and the Supreme Court overruled said suggestion of error on February 9, 1942. The said judgments of affirmance, and overruling suggestion of error appearing in 193 Mississippi, Page 266, 5 So. (2d) 487.

An appeal to the Supreme Court of the United States being applied for, was granted, and on April 27, 1942, the appeal to this Court was dismissed for want of jurisdiction; and treating the papers filed as an application for Certiorari, the Certiorari was denied. See 316 U. S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728.

A petition having been filed for a rehearing was denied by this Court on May 25, 1942. See 316 U. S. 711.

When the Mandate from this Court was sent to the Supreme Court of Mississippi, the Mandate of the Supreme Court of Mississippi was sent to the Circuit Court of Hinds County, where the judgment appealed from was rendered. An abstract of the judgment was then issued by the Clerk of the Circuit Court of Hinds County and said judgment was enrolled on the Judgment Roll of Harrison County, the county of the residence of the three persons against whom the judgment had been rendered. An execution was then requested of the Clerk of the Circuit Court of Harrison

County, which execution was issued and placed in the hands of the Sheriff, R. C. Edwins, the Sheriff of Harrison County, Mississippi.

When the Sheriff undertook to levy the execution, the judgment debtors filed a Bill in the Chancery Court of Harrison County praying for an injunction against the Sheriff, and the Tax Commissioner, to prevent the levying and execution of said writ of said execution.

A Demurrer was filed to the Bill of Complaint by the defendants setting up the fact that by the provisions of said Section 10 of the Sales Tax Law, providing an adequate and exclusive remedy for the recovery of taxes improperly paid, and prohibiting the issuance of an injunction to restrain the collection of the Sales Taxes, that no injunction could properly be issued.

The contention was also made by said Demurrer that the identical questions being presented by the Bill of Complaint had already been decided by the Circuit Court, affirmed by the Supreme Court of Mississippi, and appeal dismissed by this Court, that said decisions were res judicata, and that the former decisions constituted the "Law of the Case". And the Chancellor sustained the Demurrer and dismissed the Bill.

An appeal with supersedeas being prayed for in open Court, the appeal was granted, and the case appealed to the Supreme Court of Mississippi.

The Supreme Court of Mississippi affirmed the decree of the Chancellor on the 7th day of June, 1943. See 14 So. 2d. 212. The Court holding that the Chancellor's decision was correct, and that the questions involved were res judicata, and the Law of the Case settled by the previous decision.

A suggestion of error was filed in the Supreme Court of Mississippi and overruled on the 9th day of July, 1943. An application for a certificate from one of the Judges was

filed by the Appellants on August 7, 1943, and said application for certificate was denied September 27, 1943.

An appeal was then prayed for to this Court, which appeal was granted on the 28th day of September, 1943, hence filing of this record in this Court.

Questions Involved Are Unsubstantial.

The questions presented to this Court are so unsubstantial as not to need further argument, all of same having been fully presented and passed upon by the Supreme Court of Mississippi, and jurisdiction denied by this Court as hereinbefore set out. And this Court should, therefore, dispose of the case, either by dismissal of the appeal or by affirmance. See Rule 7, Section 4; Rule 12, Section 3; *Chicago, Rock Island & Pacific Railway Company* v. *Devine,* 239 U. S. 52, 60 L. Ed. 140, 36 S. Ct. 27; *City of Boston* v. *Jackson,* 260 U. S. 309, 67 L. Ed. 274.

The sole question that can be presented to this Court in view of the former decisions in this same case by this Court and the Supreme Court of Mississippi, is the validity of the provision of Section 10 of the Mississippi Act prohibiting the granting of an injunction to restrain the administration of the Sales Tax Law and the collection of the Sales Tax, and said question has been decided by the Supreme Court of Mississippi in the case of *Stone, Chairman of State Tax Commission,* v. *Kerr,* decided on the 7th day of December, 1942, and reported in 10 So. (2d) 845. The Court holding in said case that because the provisions of Section 10 provided an adequate, ample, and complete remedy at Law, that such provision was exclusive, and, therefore, the decision of the Chancellor in denying the injunction and dismissing the Bill was correct.

It is well settled that the construction of a state statute by the highest court of the state is binding on the Supreme

Court of the United States, and that this Court will follow the decisions of the highest court of the state in construing the statute. Among the recent cases in which this rule has been announced are:

Senn v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed. 1229;

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233;

Moorehead v. *New York ex rel. Tipaldo*, 298 U. S. 587, 80 L. Ed. 1347;

Allen Bradley Local v. *Wisconsin Employment Relations Board*, 86 L. Ed. 802.

In view of this rule the following language of the Supreme Court of Mississippi used in the decision of this case is pertinent, said language being as follows:

> "The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based.
>
> The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

This Court having by its previous decision settled the only questions of Law involved in this appeal, except the right to injunctive relief, and the Supreme Court of Mississippi having reiterated in the opinion appealed from, the same conclusion on the same questions now raised before this Court; and the Supreme Court of Mississippi having construed the state statute with reference to denial of the

injunction, there is no question remaining of which this Court will take jurisdiction.

Wherefore, the appellees hereby move the Court to dismiss this appeal or affirm the judgment herein appealed from.

Respectfully submitted,

R. C. EDWINS,
Sheriff;
A. H. STONE,
Chairman, Mississippi State Tax Commission;
J. E. DAVIS,
Excise Commissioner;
By J. H. SUMRALL,
Attorney for Appellees.

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